

UNITED STATES v. JACK C. HARRIS, JILL L. HARRIS

IBLA 77-452 Decided November 29, 1978

Appeal from decision of Administrative Law Judge E. Kendall Clarke declaring the Santa Maria placer mining claim null and void for failure to show the discovery of a valuable mineral deposit (Contest No. OR-11329).

Affirmed.

1. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Marketability—Mining Claims: Specific Mineral(s) Involved: Gold

The "marketability test"—i.e., to qualify as a valuable mineral deposit, the mineral deposit must be extractable, removable and marketable at a profit—is a complement to the "prudent man rule." The fact that a mineral such as gold possesses intrinsic value does not prevent the application of the marketability test to determine whether the deposit of such a mineral constitutes a discovery of a valuable mineral deposit under the mining laws.

2. Administrative Procedure: Burden of Proof—Mining Claims: Contests—Mining Claims: Determination of Validity

Once the Government has established a prima facie case that no discovery of a valuable mineral deposit has been made within a mining claim, the burden of proof shifts to the contestee to establish by a preponderance of the evidence the existence of a discovery.

APPEARANCES: Frederic R. Merrill, Esq., Eugene, Oregon, for appellants;
Lawrence E. Cox, Esq., Assistant Regional Solicitor, Portland, Oregon, for United States.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Jack C. and Jill L. Harris appeal from the June 9, 1977, decision of Administrative Law Judge E. Kendall Clarke in which their Santa Maria placer mining claim was declared null and void for failure to show the discovery of a valuable mineral deposit (Contest No. OR-11329). In his decision Judge Clarke also dismissed the contest against appellants' Leona placer mining claim for failure by the United States (Government) to establish a prima facie case that a discovery of a valuable mineral deposit had not been made on the mining claim. The Government did not appeal this dismissal.

The contest complaint charged that the land on which the mining claims are located is nonmineral in character and that "locatable minerals have not been found within the limits of each claim in sufficient quantities to constitute a valid discovery." The primary mineral at issue is gold. The hearing was held on September 17, 1975.

At the hearing, the Government called Mr. Harris, the contestee, Joseph F. Rudys, and Fred S. Boyd, Jr. Rudys, a mining engineer employed by the Bureau of Land Management (BLM) with approximately 22 years of experience relating to mining activities, was the Government's principal witness (Tr. 27, Exh. 1). He had personally examined the claims, taken samples, and was of the opinion that a prudent man would not be justified in the further expenditure of his labor and effort in the hopes of developing a valuable mine (Tr. 53). Boyd, also a BLM mining engineer, was called by the Government to rebut contestees' assay method (Tr. 223). Contestees called Dr. Allen S. Gottesfeld, a geologist whose specialty is sedimentology, the study and evaluation of sedimentary rock units (Tr. 127-33). He did not possess extensive experience directly related to mining activities (Tr. 130, 133).

At the close of the hearing, Judge Clarke ordered the parties to arrange further assays on duplicates of contestees' samples. The assays were to determine macroscopic gold content, free gold content by amalgamation, and gold content by fire assay. After the assay results were received, the parties submitted briefs and Judge Clarke issued his decision.

After summarizing the testimony, evidence and applicable law, Judge Clarke ruled that the Government had presented a prima facie case that no discovery of a valuable mineral deposit had been made on the Santa Maria mining claim and that contestees had not overcome

the case by a preponderance of the evidence. Judge Clarke first discounted the assay reports on the four samples from the Santa Maria claim which were submitted by contestees at the hearing. These samples were fire assayed only and failed to show the amount of gold recoverable by ordinary placer mining methods. He then found that contestees had not shown the extent of black sands on the claim which could be removed for amalgamation, a process to recover finely divided gold, or the cost of such an operation. Regarding costs, Judge Clarke also found that contestees did not detail the cost of machinery in relation to the small quantity of gravel found on the mining claim. Finally, Judge Clarke found that posthearing assays of samples taken by Dr. Gottesfeld from the Santa Maria claim and the assays of the Government's samples did not support a discovery. In reaching this conclusion, the Judge did not take into account gold recovered from the black sands by means of amalgamation.

In their statement of reasons for appeal, contestees present two arguments for reversing Judge Clarke's decision. First, they argue the Judge applied too strict a standard of proof of discovery by requiring them to detail mining costs. Second, they argue the Judge erred in failing to consider the value of the gold on the claim which is recoverable by means of amalgamation. The Government answers the first argument by quoting various Federal court decisions which discuss the proper test for determining whether a discovery has been made on a mining claim. The Government asserts that Judge Clarke applied the proper test. The Government also argues that Judge Clarke's analysis of the evidence concerning the amount of recoverable gold and cost of recovery on the Santa Maria claim is correct. The Government concludes that the contestees did not meet their burden of proof and therefore the Judge's decision should be affirmed.

In his decision, Judge Clarke has adequately discussed the testimony, evidence and applicable law. In our decision, we will address only those issues raised by appellants and the applicable evidence and law.

[1] The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, enunciated in Castle v. Womble, 19 L.D. 455 (1894), states that in order for a mineral deposit to constitute a discovery, there must be exposed within the limits of the claim minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." Simply stated, in order to qualify for a valuable mineral deposit, it must be shown that the mineral can be extracted,

removed and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968).

Appellants' first argument is that Judge Clarke incorrectly applied the marketability test by requiring a sufficient showing of mining costs. As the Government correctly argues, the marketability test is applicable to all minerals, including those of high intrinsic value such as gold. Roberts v. Morton, 549 F.2d 158, 163 (10th Cir. 1977), cert. denied, Roberts v. Andrus, 434 U.S. 834 (1977); Converse v. Udall, 399 F.2d 616, 621-22 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Rogers, 32 IBLA 77, 87 (1977). Gold can be found in varying quantities and in deposits of varying accessibility. In order for a deposit of gold to be considered a valuable deposit, it must occur in a recoverable quantity so that the anticipated costs are less than the anticipated market value of the gold as shown by present factual evidence so a reasonable profit would result. It is not the demonstrated ability to mine profitably that is essential; instead, it is whether the demonstrated facts would support a reasonable expectation that profitability could be attained by the mining venture. United States v. Adams, 318 F.2d 861 (9th Cir. 1963). Where the quantity of recoverable gold is not large or is in dispute, the costs of extraction and removal are especially important, perhaps critical, in determining whether a prudent man could objectively and reasonably expect a profitable mining operation so that a discovery would be held to exist. Therefore, Judge Clarke correctly considered the absence of such evidence in his decision on appellant's mining claim.

[2] The remaining issue on appeal involves Judge Clarke's determination that appellants did not overcome by a preponderance of the evidence the Government's prima facie case that no discovery had been made on the Santa Maria mining claim. Once the Government has established a prima facie case in a mining claim contest that the contestee does not have a valuable mineral deposit on his mining claim, the burden of proof shifts to the contestee to prove, by a preponderance of the evidence, the existence of a discovery. Humboldt Placer Mining Co. v. Secretary, 549 F.2d 622, 624 (9th Cir. 1977); Roberts v. Morton, supra at 162. Appellant contends that there is an average value of 259.7 cents per cubic yard of gold, which at an estimated 10,500 plus cubic yards, would have a total value of \$43,369.90. 1/

1/ Appellants' original samples were assayed only by fire assay IExh. H, p. 17). Fire assay uses furnace temperature heat to recover gold, a process not normally utilized in actual mining operations. See United States v. Bass, 6 IBLA 113, 118 (1972). Therefore, the amount of gold found would exceed the amount of gold recoverable either as macroscopic gold or by amalgamation.

Judge Clarke, however, at page 8 of his decision found an average value of the samples computed at 80.7 cents per cubic yard. In arriving at his average value, Judge Clarke used the amount of macroscopic gold found by the posthearing assay in appellants' four samples from the Santa Maria claim and the amount of macroscopic gold found by Rudys in his three samples. Appellants argue this ignores the free gold recovered by amalgamation in the posthearing assay. Their average and total values are based on the amount of macroscopic gold and free gold by amalgamation found in the posthearing assay and the macroscopic gold found by Rudys. They also point out that Rudys did not utilize amalgamation techniques on his samples.

While ordinarily values of gold recovered by amalgamation would be relevant in evaluating the value of a deposit, we see no error in this case by the Judge's failure to use such values. Before any value can be ascribed to a deposit there must first be a finding of a mineable deposit from which the minerals can be extracted and recovered at a proven cost. The essence of the Judge's finding in this case is that there is not such a deposit mineable without prohibitive expense within this claim. This is clear from the following quotations of his findings:

Mr. Rudys, who has a strong background in practical mining, after examining the Santa Maria concluded that it simply was not placer ground. He considered the stream gravels of the Olalla Creek on that claim which are essentially the only gravels present. He testified that there were a large number of boulders which would make mining impractical. He did not estimate the yardage of gravel present for the reason that he felt it was unmineable. His analysis of the gravel present seems to be supported fully by the very detailed work on the geology performed by Dr. Gottesfeld. Dr. Gottesfeld, in fact, estimated the total gravel present on the Santa Maria claim detailing that on page 11 of Exhibit H. He shows a volume of 16,700 plus yards, approximately 10,500 of which are modern stream gravels, those which Mr. Rudys testified were unmineable because of the number of large cobbles and boulders.

With his strong practical background guiding his analysis, Mr. Rudys was of the opinion (in view of the condition of the step stream bed and the small quantity of gravel present which revealed only scant mineralization) that a prudent man would not expend his time and means with a reasonable prospect of developing a paying mine on the Santa Maria claim. From his testimony, one must conclude that the Contestant, in regard to the Santa Maria claim, has made a prima facie case.

Has that prima facie case been overcome by the preponderance of the evidence presented by the Contestees? Here I must conclude that it has not for the following reasons. First of all, although Dr. Gottesfeld has done an outstanding job of mapping the geology and the various lithological units on this claim, the analysis which he caused to be performed on the gravel samples from this claim shows results which are totally meaningless for they do not reveal how much free gold may be recovered. Secondly, there is no substantial evidence presented which shows the extent of the black sands which could be recovered for amalgamation to recover the finely divided gold not amenable to recovery by the ordinary sluice box method. He presented no substantial evidence as to the cost of processing the black sands with view to obtaining all of the free gold from the material. Even though Dr. Gottesfeld mentioned off-handedly, that he thought a process could be devised which could have recovery costs in the neighborhood of \$1 to \$2 per yard, nowhere does he detail the cost of the machinery and the amortization which would have to be attributed to such machinery for a quantity of gravel as small as that found on the Santa Maria claim.

Decision at 6-7.

Judge Clarke also discredited the value of appellant's samples for several reasons. He pointed out that the recovery of gold from Dr. Gottesfeld's samples was done under laboratory conditions, rather than production conditions. Also, he found that Dr. Gottesfeld's samples were extremely small for placer samples, the one having the highest value being under three pounds which he stated "cast grave doubt on its value in predicting anything regarding the remainder of the gravel on that claim." Decision at 9. By contrast, he noted that Mr. Rudys' samples were at least 1/2-cubic foot or more than 50 pounds.

We agree with Judge Clarke that there was sufficient evidence by the Government to establish a prima facie case on this case and, also, that appellant has not refuted that case. We do not find support in the record for appellant's optimistic estimate of recoverable gold. Indeed, it is questionable if more than a minimal amount for sampling could be recovered. We see nothing to show that there is sufficient gold within this claim to warrant a prudent man to expend money and time with reasonable expectation that a profitable mining operation could be maintained on the claim.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

decision of Administrative Law Judge E. Kendall Clarke holding the Santa Marie placer mining claim null and void is affirmed.

Joan B. Thompson
Administrative Judge

We concur.

Newton Frishberg
Chief Administrative Judge

Joseph W. Goss,
Administrative Judge

